Supreme Court, U.S.
FILED

03 780 NOV 17 2003

In the

Supreme Court of the United States

ISAIAH RUSSELL JONES, ROBERT SPARKS, JR. & HERMAN PARKS, JR.,

Petitioners,

v.

ALCOA, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. In *Delaware State College v. Ricks*, 449 U.S. 250, 262 (1980), this Court said that limitations begins to run in cases brought under 42 U.S.C. §1981 on the date of the discriminatory act, not when the consequences of the act are realized. But, in the same case, the majority recognized that the date of the event might be an unfair trigger for limitations purposes when "... it becomes difficult for a layman to invoke the protection of the civil rights statutes." Does the rule in *Ricks* apply even where a Plaintiff suffers no injury at all within the limitations period, but suffers an injury after limitations has run?

PARTIES TO THE PROCEEDINGS

Petitioners

Isaiah Russell Jones
Robert Sparks, Jr.
Herman Parks, Jr.

Respondent

Alcoa, Inc.

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OPINIONS BELOW

The United States District Court decided the case by unpublished written order (Appendix B). The 5th Circuit Court of Appeals issued an opinion that was is published at 339 Fed.3rd 359 (Appendix A).

JURISDICTION

The District Court dismissed the case under Rule 12b (6), Fed. R. Civ. P., and entered a final judgment. The Plaintiffs appealed that decision to the 5th Circuit Court of Appeals under 28 U.S.C. §1291 because it was an appeal from a final judgment. The Court of Appeals entered its decision on July 21, 2003. The Plaintiffs filed a Motion for Rehearing that was denied on August 18, 2003.

Jurisdiction of the Court is founded on 28 U.S.C. §1257. Under Rule 10 of the Supreme Court Rules, this Court should grant this Petition. The decision of the District Court, affirmed by the 5th Circuit, decided important questions of federal law that had not been, but should be, settled by this Court. In particular, the Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980) establishes a general rule that determines the date upon which limitations begins to run under 42 U.S.C. §1981. But, that Rule cannot be rationally applied to a situation where the injury suffered by a Plaintiff is not known and may not exist until after the period of limitations has expired. When a Plaintiff does not know, and cannot reasonably know that an injury has occurred, it becomes "...difficult for a layman to invoke the protection of the civil rights statutes" – a situation foreseen by the *Ricks* court, and

impliedly outside of the general rule. This case, then, presents a special fact situation that requires that *Ricks* be revisited.

RELEVANT PROVISIONS

§ **1981.** Equal rights under the law

> (a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT

(a) Course of Proceeding & Disposition of the Case Below

The Plaintiffs filed suit individually and as representatives of a purported class of persons who suffered from discrimination at the Alcoa plant in Rockdale, Texas. After initial contests to their pleadings, the Plaintiffs filed a Second Amended Complaint – which forms the basis for the claims relevant to this Petition. Alcoa responded to the Second Amended Complaint with a Motion to Dismiss, arguing that the Plaintiffs had waited too long to sue over their injuries.

The District Court considered Alcoa's argument, and initially denied the Motion to Dismiss in a Memorandum Opinion and Order. The case proceeded for consideration as a class action. In December of 2001, the District Court held a hearing on the Plaintiffs' Motion to certify a class, and reconsidered its ruling on the limitations defense *sua sponte*.

By written order, the District Court reversed itself, finding that the Plaintiffs' claims were barred by limitations. (Appendix B). A final judgment was entered by the Clerk, and the Plaintiffs appealed to the 5th Circuit. The 5th Circuit affirmed – finding that limitations did, indeed, bar the claim. (Appendix A).

(b) Statement of Facts

This case was decided based solely on the pleadings of the Plaintiffs. So, the relevant facts come

exclusively from the Plaintiffs' Second Amended Complaint. In their complaint, the Plaintiffs say –

- The Plaintiffs are all former employees of Alcoa at the Rockdale plant in Milam County, Texas.

- The named Plaintiffs are of the African-American, or Negro race and were employed and worked primarily in only three departments: the pot lining department, the carbon plant, and the rod room at Alcoa's facility in Rockdale, Texas.

- All of the employees in these departments from the 1950s, when the plant opened, until the early 1970s were of the Negro race except the supervisors or the second classmen, i.e. crane operators, etc.

- As Negro employees, they were not allowed to use restroom and dining facilities utilized by the white employees, nor were they allowed advancement to other higher paying jobs in the other departments; rather, they were required to continue to work in the pot lining, the carbon plant and the rod room departments. Alcoa utilized this employment practice in its other similar facilities throughout the southern portion of the United States.

- During this time, the employees of Alcoa, and especially the African-American, or Negro employees in the pot lining department, the carbon plant, and the rod room, without knowledge on their part worked with asbestos products.

- In the performance of their jobs, a large quantity of asbestos "dust" was generated and released into the air that they breathed into their lungs on a daily basis.

- At no time were they warned of the dangers of this "dust" nor were they provided safety gear.

- Alcoa knew the danger of breathing this dust.

- Throughout this period of time, with the exception noted above, Alcoa employed only employees of the Negro race in these departments.

- Alcoa was aware of the impact of this asbestos laced dust and its connection with life threatening diseases but failed to warn its Negro employees, take preventive measures of any kind, or extend any assistance in monitoring their health.

- Instead, Alcoa continued to segregate this class of employees, and to place them in these dangerous working conditions.

- As a result of Alcoa's intentional racial discrimination practices and their failure to furnish a safe place to work when it knew its conduct was substantially certain to cause injury, many of the above class of employees, including the Plaintiffs, have developed lung disorders. In addition, many former Alcoa employees from this plant have died from lung cancer.

- Other similarly situated former employees ingested these asbestos fibers on a daily basis and are in danger of developing further health complications to include terminal lung cancer.

- As a result of Alcoa's racial discrimination, the Plaintiffs and similarly situated co-workers have suffered permanent and life threatening injury to their health, and will continue to do so.

- As a result, Plaintiffs are incurring and will continue to incur significant medical expenses, as well as a shortened and diminished quality of life.

- The segregation of African-American or Negro employees into the pot lining department, the carbon plant, and the rod room is statistically significant, and significantly disparate. The only white employees in those departments were supervisors or upper level employees. Thus, Alcoa not only decided to put African-American workers at risk in these departments, it decided not to expose white workers to those same conditions. From this standpoint, the discriminatory conduct of Alcoa is purposeful and intentional.

- If necessary, the Plaintiffs can show this disparate treatment by statistics alone, in that there is a gross disparity between the treatment of African-American or Negro workers and other workers at the Alcoa plant in Rockdale during the relevant time period.

- Alternatively, there is a disparate impact on African-American or Negro workers at the Rockdale Alcoa plant during the relevant time period. On information and belief, the African-American or Negro former employees who worked in the pot lining department, the carbon plant, and the rod room at the Alcoa plant in Rockdale are suffering asbestos related illnesses in greater numbers than is statistically likely. So,

regardless of Alcoa's intent, its employment practice has had a disparate impact on African-American former employees.

- Each of the Plaintiffs, and each member of the putative class, engaged in activity protected by 42 U.S.C. §1981. In particular, each sought employment with Alcoa at the Rockdale plant.

- Further, each Plaintiff, and each member of the putative class suffered injury as a result of the disparate and discriminatory treatment of Alcoa in assigning them to the pot lining department, the carbon plant, and the rod room. The injury is disease and health risks that are associated with breathing asbestos dust.

- There is a significant causal connection between the conduct of Alcoa and the injury suffered.

- The assignment of African-American or Negro personnel to the pot lining department, the carbon plant, and the rod room was a term required in the formation of the contract. It is therefore actionable under 42 U.S.C. §1981(a), even during the relevant time period.

- Alternatively, the assignment of African-American or Negro personnel to the pot lining department, the carbon plant, and the rod room was a term implied in the performance of the contract of employment, and the enjoyment of all benefits, privileges, terms and conditions of the employment relationship. It is therefore actionable under 42 U.S.C. §1981(a) & (b). Although courts have not applied the 1991 amendments to §1981 to conduct prior to the effective date, it is the Plaintiffs' position that the conduct of Alcoa in its discriminatory assignment is covered by the original intent of §1981, and has only been more clearly stated by the 1991 amendments.

REASONS FOR GRANTING THE WRIT

In *Delaware State College v. Ricks*, 449 U.S. 250, 262 (1980), this Court said that limitations begins to run in cases brought under 42 U.S.C. §1981 on the date of the discriminatory act, not when the consequences of the act are realized. But, in the same case, the majority recognized that the date of the event might be an unfair trigger for limitations purposes when "... it becomes difficult for a layman to invoke the protection of the civil rights statutes." Does the rule in *Ricks* apply even where a Plaintiff suffers no injury at all within the limitations period, but suffers an injury after limitations has run?

There is no question, at this point, about the applicable period of limitation. The great weight of authority says that the Texas two-year statute of limitations for all personal injuries should apply to cases brought under §1981. The critical question in this case is when the statute begins to run. Alcoa's position is that there is a single injury that §1981 was intended to address – the act of discrimination. Under that theory, limitations must begin to run on the date that the act of discrimination occurs, and no later. The Plaintiffs, though, did not suffer the typical injury from a discriminatory act. The typical injury is to deny wage or salary increases, or to treat employee benefits differently. A bodily injury or disease is not a typical injury resulting from discrimination in an employment context. But, because of discriminatory work assignments, the Plaintiffs in this case suffered a bodily injury or disease that did not exist on the date of discrimination, or until long after the limitation period had run. In this special circumstance, the act of discrimination cannot be a rational measuring date for the limitations period.

Is the Plaintiffs' Only Injury an Act of Discrimination that Occurred at the Time of Hiring?

Alcoa's argument was that there was but a single injury – one that occurred when the discriminatory act occurred. In the case of each Plaintiff in this case, that act would have occurred at the time that they were hired, and assigned to the jobs that exposed them to extraordinary health risks. In a renewal of its previously denied argument, Alcoa relied on *Delaware State College v. Ricks*, 449 U.S. 250 (1980).

In that case, this Court held that §1981 discrimination claims accrue at the time of the illegal employment action, not when the consequences of that action come into effect. The Court said:

> "The proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (1979) (emphasis added); see *United Air Lines, Inc. v. Evans*, 431 U.S., at 558, 97 S.Ct., at 1889. It is simply insufficient ... to allege that ...[a] termination 'gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination.' *Id.* at 557, 97 S.Ct. at 1888. The emphasis is not upon the effects of earlier employment decisions; rather, it 'is [upon] whether any present *violation* exists.' *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980).

Under this argument, Alcoa's act of segregating blacks into hazardous job assignments was an act of discrimination that could have been remedied under §1981. But, the argument goes, a suit for that remedy had to be filed within two years of the date that the job assignment was made.[1]

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[1] It is important to understand that the Plaintiffs certainly were treated differently because of their race when they were hired. But, the differing treatment did not result in quantifiable damage. The Plaintiffs got the jobs that they were seeking (entry level positions at the Alcoa plant. The discrimination did not affect pay, benefits under the Plaintiffs' Complaint. In the employment

The argument, though, ignores the purpose of the Civil Rights Statutes. The Plaintiffs case here centers on an unlawful act – segregation – designed to put the Plaintiffs at an increased health risk. When that risk manifests itself in an actual disease, the Defendant should not be permitted to avoid responsibility simply by arguing that the Plaintiffs are limited to some contractual remedy – back pay, front pay, or the like. None of the common remedies for employment discrimination will compensate the Plaintiff for their injuries. Nor does §1981 restrict the Plaintiffs to a contractual remedy. The Civil Rights Statutes are intended to compensate bodily injury, even if the claim is based on racial discrimination. *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981). The Civil Rights Statutes should compensate the Plaintiffs here because the intentional discrimination that they suffered was not intended to restrict their m rights to a present or future salary, or a future pay raise. The intentional discrimination was intended to impact the Plaintiffs' health – not their contractal rights. The Plaintiffs were not segregated to restrict their compensation, but to "allow" African Americans to take health risks instead of exposing whites to those risks.

Under these circumstances, the District Court's decision to rely solely on the date of the discriminatory act was wrong. Even under *Ricks*, courts should not make a mechanical application of the rules for the

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contract, the Plaintiffs got what they bargained for in terms of pay and position. But, in the formation of the contract, they also got exposure to deadly material that they were unaware would cause injury in the future.

accrual of limitations. In *Ricks*, the plaintiff was a university professor who was denied tenure. He argued that the denial was impermissibly based on race, but waited over three years to sue under §1981. This Court denied his claim because it was abundantly clear that the alleged discriminatory act had occurred, and that discriminatory act would have certain consequences – the eventual loss of Ricks' employment. So, the fact that the effect of losing his job might not be manifested until some date after the day that the discrimination occurred was no reason to extend limitations until the effects were felt.

The situation of the Plaintiffs in this case is markedly different. Although they might have complained about their job assignments, they could not realistically argue that their contractual rights were damaged. Had they filed suit over their assignment at the Alcoa plant, a federal judge would have dismissed the claim almost immediately because there was no damage. The Plaintiffs may have had a case on liability, but their claim was incomplete without damage resulted from the wrongful act. In their situation, they could not have known that the injury that they suffered from discrimination was to their health – not to their wage rate or daily tasks. This Court recognized that this situation might eventually present itself when it wrote *Ricks*. A footnote in *Ricks* said:

> "We recognize, of course, that the limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes. See *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761 (1979);

> *Love v. Pullman Co.*, 404 U.S. 522, 526-527 (1972). But, for the reasons we have stated, there can be no claim here that Ricks was not abundantly forewarned. In *NLRB v. Yeshiva University*, 444 U.S. 672, 677 (1980), we noted that university boards of trustees customarily rely on the professional expertise of the tenured faculty, particularly with respect to decisions about hiring, tenure, termination, and promotion. Thus, the action of the Board of Trustees on March 13, 1974, affirming the faculty recommendation, was entirely predictable. *Delaware State College v. Ricks*, 449 U.S. 250, 262 (1980).

The action of Alcoa in making job assignments to each of the Plaintiffs had no consequence that was predictable, or even knowable. To the contrary, the Plaintiffs did not, and could not reasonably have known that the discrimination would result in a deadly occupational disease.

Quite simply, Alcoa argues for a bright line rule that focuses solely on the existence of a present violation of §1981. If the complaint does not allege a discriminatory act occurring within two years of the filing date, it does not matter what the consequences of the discrimination were, nor whether the Plaintiff could have ever discovered the injury. Alcoa's rule would require suits where the injury was unknown or unknowable – or that had not even occurred. While such a rule might encourage remediation (curing of discriminatory conduct), it could never focus on

compensation for the injury if the rule requires suit before an injury is known or before it occurs. This type of rule is contrary to the purpose and intent of the Civil Rights statutes. A compensatory remedy is the hallmark of the Civil Rights statutes – not simply the injunctive relief that is an alternative under the acts.

The Plaintiffs seek a remedy that not only permits fair compensation for the actual injury suffered, which is consistent with the purpose of the Civil Rights statutes. The statutes are intended to provide a compensatory remedy by their plain language, and the courts have consistently interpreted the acts to focus on compensation, not remediation. See *Jett v. Dallas Independent School District*, 491 U.S. 791 (1989) and *Carey v. Piphus*, 435 U.S. 247 (1978). To require victims of discrimination to sue before they have suffered an injury, or before the extent of their injury is known makes the Civil Rights statutes a tool to benefit government and business to identify their problematic practices, not an enforcement statute to benefit injured citizens as originally intended.

Are there recognized legal principles that extend limitations?

Under generally accepted principles relating to the application of the statute of limitations, a claim does not "accrue", and limitations does not run until a plaintiff is **aware** of his claim. Alcoa advances no argument that the plaintiffs in this case were aware of their claim more than two years before they filed suit. Moreover, personal injuries in Texas (and under federal law) are routinely subject to the discovery rule. In other words, accrual of a claim (and the running of

limitations) is deferred until a time where a reasonable person knew or should have known of his claim. Again, Alcoa does not seriously argue that the Plaintiff knew or should have known of their claim more than two years before suit.

The accrual period should not begin to run until a Plaintiff is aware of his claim.

"Under federal law, the [limitations] period begins to run 'the moment the plaintiff becomes **aware** that he has suffered an injury or has sufficient information to know that he has been injured.'" *Russell v. Board of Trustees*, 968 F.2d 489, 493 (5th Cir.1992). (emp. added). Awareness encompasses two elements: (1) The existence of the injury; and (2) causation, that is, the connection between the injury and the defendant's actions. See *Stewart v. Parish of Jefferson*, 951 F.2d 681, 684 (5th Cir.), cert. denied, 506 U.S. 820 (1992). A plaintiff need not realize that a legal cause of action exists; a plaintiff need only know the facts that would support a claim. See *Harrison v. United States*, 708 F.2d 1023, 1027 (5th Cir.1983) ("The plaintiff need not have knowledge of fault in the legal sense for the statute to begin to run, but she must have knowledge of facts that would lead a reasonable person (a) to conclude that there was a causal connection ... or (b) to seek professional advice, and then, with that advice, to conclude that there was a causal connection between the [defendant's acts] and injury."). *See Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995).

In this case, the Plaintiffs were not *aware* of the existence of an injury because the injury (respiratory disease) did not manifest itself for many years after the

date of the injury (exposure to asbestos due to the segregated conditions at the Rockdale plant). Therefore, even under a typical application of the accrual rules, the Plaintiffs' claims in this case did not accrue until they learned of the existence of an injury. The two year statute does not begin to run until the claim has "accrued" in the sense that the plaintiff is aware that he has a claim. Until the plaintiff is aware of his claim, no lapse of time will bar his claim. The Second Amended Complaint does not conclusively show that this accrual occurred more than two years before the filing of suit.[2]

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[2] Because the District Court decided this case on a Motion to Dismiss under Rule 12(b)(6), Fed. R. Civ. P., the facts in the Complaint are the only facts that the Court should consider. complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim. *Wilting v. Progressive County Mut. Ins. Co.*, 227 F.3d 474, 475 (5th Cir. 2000). The dismissal is judged solely with reference to the pleadings of the plaintiff, and without reference to any other facts that might bear upon the claim. This standard was recognized by the 5th Circuit, which has held:

> "We accept a plaintiff's factual allegations as true when considering motions to dismiss under Fed. R. Civ. P. 12(b)(6). *Buckley v. Fitzsimmons*, 509 U.S. 259, 261, (1993); *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir.1995). Unless such allegations show that the plaintiff has failed to state a claim upon which relief can be granted, this court will not grant a motion to dismiss under 12(b)(6). *Id.* This court will not look beyond the face of the pleadings to determine whether relief should be granted based on the alleged facts, *St. Paul Ins. Co. of Bellaire, Texas v. AFIA Worldwide Ins. Co.*, 937 F.2d 274, 279 (5th Cir.1991), cert. denied, 502 U.S. 1030 (1992), and will construe all factual allegations in the light

Does the Discovery Rule Affect the Statute of Limitations?

Similarly, a statute of limitations may not bar a claim where equitable principles defer the running of limitations. Under Alcoa's argument, it is the act of discrimination that triggers limitations, regardless of the time at which the consequences of the discrimination are manifested. But, this argument ignores the circumstance where the plaintiff did not and could not know of his injury before the expiration of the limitations period. The Plaintiffs in this case are not complaining that the discrimination denied them some contractual benefit like fair wages, proper promotions or other employment benefits. If they were, then Alcoa's rule might make sense. The discrimination in this case was not designed to deprive the Plaintiffs of compensation or promotions. The discrimination was designed to expose the Plaintiffs to extraordinary health risks, and to spare white employees that same risk. There is no good reason to require a plaintiff – any plaintiff – to sue before he knows that the intent of his employer to harm his health has actually come to pass.

This is yet another reason that limitations does not bar their claim. Texas applies a "discovery rule" to the limitations defense in personal injury cases, and the discovery rule should apply here. When the discovery rule applies, the plaintiff's cause of action does not accrue on the date the tortious act occurred, but on the

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most favorable to the plaintiffs, *Rubinstein v. Collins*, 20 F.3d 160, 166 (5th Cir.1994). *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999)

date the plaintiff discovers, or reasonably should have discovered, both the injury and its cause. *United States v. Kubrick*, 444 U.S. 111, 122 (1979) (Federal Tort Claims Act case). See also *Urie v. Thompson*, 337 U.S. 163, 170 (1949) (FELA claim does not accrue until the injury manifests itself).

As explained by the Texas Supreme Court:

> "Statutes of limitations are intended to compel plaintiffs to assert their claims 'within a reasonable period while the evidence is fresh in the minds of the parties and witnesses.' *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex.1996). The discovery rule exception operates to defer accrual of a cause of action until the plaintiff knows or, by exercising reasonable diligence, should know of the facts giving rise to the claim. *Id.* We have described the discovery rule as 'a very limited exception to statutes of limitations,' and have condoned its use only when the nature of the plaintiff's injury is both inherently undiscoverable[3]

[3] "An injury is inherently undiscoverable if it is, by its nature, unlikely to be discovered within the prescribed limitations period despite due diligence. *S.V. v. R.V.*, 933 S.W.2d 1, 7 (Tex.1996) (citing *Altai*, 918 S.W.2d at 456). 'Inherently undiscoverable' does not mean that a particular plaintiff did not discover his or her particular injury within the applicable limitations period. *Id.* Instead, we determine whether an injury is inherently undiscoverable on a categorical basis because such an approach 'brings predictability and consistency to the jurisprudence.' *Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 122 (Tex.2001) (citing *S.V. v. R.V.*, 933 S.W.2d at 6); *see also HECI Exploration Co. v. Neel*, 982

and objectively verifiable. *Id.* at 455-56. *Wagner & Brown, Ltd. v. Horwood,* 58 S.W.3d 732, 734 -735 (Tex. 2001).

It is generally accepted that a cause of action for a tort accrues when there has been an invasion of the plaintiff's legally protected interest. See Restatement (Second) of Torts § 899 comments c & e (1977). Ordinarily, this invasion occurs at the time the tortious act is committed. *Id.*; *DuBose v. Kansas City Southern Railway*, 729 F.2d 1026, 1028 (5th Cir.), cert. denied, 469 U.S. 854 (1984). If some injury is discernible when the tortious act occurs, limitations begins to run when that tortuous act occurs. The appropriate rule to apply is the "time of event" rule. So, even if the plaintiff later discovers that his injuries are more serious than originally thought, his cause of action nevertheless accrues on the earlier date, the date he realized that he had sustained some harm from the tortious act. In some cases, however, the injured person may not realize that a tort has been committed when he sustains a latent injury which either is not or cannot be discovered until long after the tortious act that caused the injury has occurred. In such a case, courts have routinely applied the discovery rule to toll the running of the statute of limitations.

In *Albertson v. T.J. Stevenson & Co., Inc.*, 749 F.2d 223 (5th Cir. 1984), the Plaintiff was not bound by what seemed to be an obvious application of the statute of limitations. *Albertson* involved exposure to toxic substances. The Plaintiff acknowledged that he

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S.W.2d 881, 886 (Tex.1998)." *Wagner & Brown, Ltd. v. Horwood,* 58 S.W.3d 732, 734 -735 (Tex. 2001)

suffered headaches, blackouts, and nausea immediately after being exposed, and knew that the exposure caused these problems. But, the Plaintiff later suffered far more serious injuries that were discovered long after the statutory limitations period had expired. The Defendant argued that since the Plaintiff knew his legally protected interest had been invaded the moment he experienced his first debilitating headache or blackout, he had sufficient notice that a tort had been committed upon him when he had the headaches. After all, a plaintiff cannot delay filing suit until the full extent of his injuries becomes known.

There are two types of injury cases that manifest themselves after the actual event. The cases were in two general categories: the pure latent injury case and the traumatic event/latent manifestation case. The pure latent injury case unquestionably includes a suit by a worker who contracts an occupational disease.

The discovery rule was initially articulated and has had its greatest acceptance in the occupational disease case. Because of the nature of the disease, the worker typically does not realize he has been injured until years after he was initially exposed to the substance causing the disease. In the leading case of *Urie v. Thompson*, 337 U.S. 163 (1949), a train worker contracted silicosis, a pulmonary disease, from the continuous inhalation of silica dust over a period of thirty years. The worker became aware of his occupational disease only after he was unable to work, and he sued his employer shortly thereafter. The employer pled the FELA three-year statute of limitations as a defense. This Court rejected the defense, reasoning that in enacting the FELA

Congress did not intend to charge an innocent plaintiff with knowledge of facts which are "unknown and inherently unknowable." *Id.* at 169. The Court recognized that since the purpose of the statute of limitations was to ensure prompt vindication of known rights, that purpose was ill-served where the employee was unaware that his legal rights were invaded. Accordingly, the Court held that an employee continuously exposed to a toxic substance over a period of time is "'injured' only when the accumulated effects of the deleterious substance manifest themselves." *Id.* at 170.

In a pure latent injury cases, the plaintiff is a victim of postponed awareness of his injury, the cause of his injury, or both the injury and its cause. Logic and sound jurisprudence mandate the conclusion that a plaintiff's cause of action does not accrue under these circumstances until the injury and the cause are knowable. This conclusion merely reflects the reluctance of courts to charge plaintiffs who had no indication that they were victimized by a tortfeasor with knowledge of what the Court characterized over forty-five years ago as the "unknown and inherently unknowable." *Urie*, 337 U.S. at 169.

Alcoa never questioned the status of the Plaintiffs' health problems as "latent injuries" that had not manifested for many years. Initially, the District Court came to this same conclusion – ruling that that Plaintiffs' claims had not accured, or that the discovery rule would defer accrual until a reasonable person would have known of the claim. (R. 152-153). This was a proper application of the statute of limitations defense, because it takes into account the precise injury

claimed by the Plaintiffs, and evaluates that injury in light of the reasonable response of the Plaintiffs to the injury – deciding whether the injury was inherently undiscoverable and objectively verifiable.

CONCLUSION

Admittedly, permitting a lawsuit over conduct that occurred between thirty and fifty years ago runs against the grain of most courts. There is an intuitive reaction to such a suit that says that the Plaintiffs waited too long, that proof would be difficult if not impossible, or that the defense of the case would be hampered by the lapse of time. But, this is not a case of a plaintiff waiting for an opportune time to file suit. The Plaintiffs here had no idea that they would suffer from a deadly disease simply because of the color of their skin. A proper balance of the interests here would permit the Plaintiffs their day in court, not a dismissal without any evidentiary hearing or meaningful discovery. The rule established by this Court in *Ricks* leaves room for the possibility that a bright line determination of the date that limitations begins to run might be intolerable in some circumstances. That rule should not apply when the Plaintiff has simply not suffered any injury until after the limitations period has run. If there is no injury on the date of limitations, then limitations should run on the date that the Plaintiff becomes aware of his injury, and no sooner. For this reason, the judgment of the District Court, and that of the Court of Appeals should be reversed, and the case remanded for trial.

Respectfully submitted,

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(Any footnotes trail the end of each document)

No. 02-50097

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ISAIAH RUSSELL JONES; ROBERT SPARKS, JR.; HERMAN PARKS, JR.,
Plaintiffs-Appellants,

versus

ALCOA, INC.,
Defendant-Appellee.

July 21, 2003, Filed

COUNSEL: For ISAIAH RUSSELL JONES, ROBERT SPARKS, JR, HERMAN PARKS, JR, Plaintiffs - Appellants: Steven Gregory White, McGregor & White, Waco, TX.

For ALCOA INC, Defendant - Appellee: Christopher A Knepp, Vinson & Elkins, Austin, TX.

JUDGES: Before GARWOOD, JONES and STEWART, Circuit Judges.

OPINIONBY: GARWOOD

OPINION: GARWOOD, Circuit Judge:

Plaintiffs Isaiah Russell Jones (Jones), Robert Sparks Jr. (Sparks), and Herman Parks Jr. (Parks) filed this lawsuit October 4, 2002, against defendant Alcoa, Inc. (Alcoa), a Pennsylvania corporation, alleging that Alcoa

discriminated against them on the basis of race, in violation of 42 U.S.C. § 1981, by assigning them to work in areas of Alcoa's Milam County, Texas, plant where they were exposed to dangerous amounts of asbestos dust. The district court granted Alcoa's Rule 12(b)(6) motion to dismiss, finding that the plaintiffs' claims were time barred. We agree with the district court, and for the reasons set forth below, we affirm.

I. Background

The plaintiffs, all African-Americans and citizens of Texas, began working at Alcoa's Rockdale plant in Milam County, Texas, between 1953 and 1970. According to the plaintiffs, beginning in the early 1950s and continuing until 1970, n1 Alcoa intentionally discriminated against them and other African-American employees by assigning them to work exclusively in the potlining department, the rod room, and the carbon plant, areas of Alcoa's Rockdale plant where employees were regularly exposed to large quantities of asbestos dust. In addition, the plaintiffs alleged that Alcoa engaged in other racially discriminatory acts, including denying them access to dining and restroom facilities reserved for white employees, denying them transfers out of the three above-mentioned departments of the plant, and refusing to promote them to higher-paying or supervisory positions.

Recently, all three of the plaintiffs have begun to develop lung disorders, disorders that they attribute to exposure to asbestos dust while assigned to the rod room, carbon plant, and potlining department at the Rockdale plant. The plaintiffs' suit was filed in state court in Milam County, Texas, to recover for their injuries, and Alcoa removed the suit to the district court below on the basis of diversity and federal question

jurisdiction. n2 Thereupon, Alcoa moved to dismiss the plaintiffs' complaint under Federal Rule of Civil Procedure 12(b)(6), arguing that the plaintiffs' section 1981 claim was barred by the two-year statute of limitations provided under Texas law for personal injury actions. See TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 2002). The district court, applying the discovery rule and concluding that the plaintiffs' cause of action did not arise until they became aware of their lung disorders, initially disagreed and denied the defendant's motion. Upon reconsideration, however, the district court found that the plaintiffs' claim was governed by the Supreme Court's decision in Delaware State College v. Ricks, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980), that the discovery rule, therefore, did not operate to toll the statute of limitations, and that the plaintiffs' section 1981 claim was, in fact, time-barred. The court granted the defendant's motion to dismiss and the plaintiffs now appeal.

II.

We review de novo a district court's grant of a motion to dismiss for failure to state a claim, see Copeland v. Wasserstein, Perella & Co., Inc., 278 F.3d 472, 486 (5th Cir. 2002), taking the actual allegations of the complaint as true, and resolving "any ambiguities or doubts regarding the sufficiency of the claim in favor of the plaintiff." Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 284 (1993). However, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." Id. See also Taylor v. Books A Million, 296 F.3d 376, 378 (5th Cir. 2002).

As a threshold matter, we note that the discriminatory acts complained of long antedate the 1991 amendments

to section 1981. It is therefore highly doubtful that the plaintiffs even present a claim cognizable under the then extant version of section 1981. The plaintiffs' allegations appear to challenge discriminatory terms and conditions of their employment with Alcoa. Under Patterson v. McLean Credit Union, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989), however, the pre-November 1991 version of section 1981 relevant to the plaintiffs' complaint "covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process," not conduct that occurs after contract formation and that affects only the benefits, privileges, terms, and conditions of employment. See Felton v. Polles, 315 F.3d 470, 483 (5th Cir. 2002). Although section 1981 has since been amended to "'legislatively reverse[ ]' Patterson," we have repeatedly held that that "amendment 'is not to be given retroactive effect.'" Id. at 484 (quoting Nat'l Ass'n of Gov't Employees, 40 F.3d 698, 713 (5th Cir. 1994)). n3

The plaintiffs do allege in their complaint that their assignment to the pot lining department, the carbon plant, and the rod room was a term required in the formation of their contract with Alcoa, and therefore actionable under section 1981. And, it is true that this court, for purposes of a motion to dismiss, will generally accept the "pleader's description of what happened to him along with any conclusions that can reasonably be drawn therefrom." 5A CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (2d ed. 1990). The plaintiffs' allegation, however, is devoid of detail, let alone any factual basis to support the conclusion that assignment to the three areas in question was, in fact, a term implied in the plaintiffs' initial employment contract and not a subsequent term or condition of employment at the Rockdale plant. Even for purposes of a motion to

dismiss however we need not accept such conclusory statements, n4 particularly where they concern the legal effect of an allegation n5 or involve a question of law normally reserved for the court, such as the interpretation of an implied term in an employment contract. n6 Moreover, the plaintiffs' efforts, discussed below, to define their injury as the discriminatory exposure to asbestos and the denial of promotions out of certain departments tends to undermine the claim that the challenged discrimination occurred only in connection with the formation of their employment contracts as required by Patterson. There is a substantial question, therefore, whether, even apart from the limitations issue, the plaintiffs allege a claim cognizable under section 1981. n7 See, e.g., Felton, 315 F.3d at 484-485 (holding that a claim of racial harassment, based on conduct occurring prior to the 21 November 1991 amendments, is not actionable under section 1981). Nevertheless, because we hold that the plaintiffs' claim is time-barred, we need not resolve whether Alcoa's discriminatory assignment of the plaintiffs to the areas of the plant in question was a term implicit in the formation of their contracts and therefore actionable under section 1981, or whether that discriminatory assignment and subsequent asbestos exposure was merely a condition of employment not actionable under the pre-1991 version of section 1981.

III.

Assuming, arguendo, that the plaintiffs have alleged a claim cognizable under section 1981, our review focuses on the district court's conclusion that the plaintiffs' claim falls outside the relevant limitations period.

Federal civil rights actions brought under 42 U.S.C. § 1981, which lacks an express statute of limitations, are

governed by the most closely analogous limitations period provided under state law. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 95 S. Ct. 1716, 1721, 44 L. Ed. 2d 295 (1975); White v. United Parcel Service, 692 F.2d 1, 2 (5th Cir. 1982). Thus, where a section 1981 claim is brought in Texas, the two-year statute of limitations for personal injury actions in Texas controls. See Byers v. Dallas Morning News, Inc., 209 F.3d 419, 424 (5th Cir. 2000); Price v. Digital Equip. Corp., 846 F.2d 1026, 1028 (5th Cir. 1988).

The parties agree that a section 1981 claim must be brought not later than two years after the cause of action accrues. Their dispute, rather, concerns the date on which the plaintiffs' claim against Alcoa accrued. The determination of that date is, in turn, a question of federal law. See Perez v. Laredo Junior College, 706 F.2d 731, 733 (5th Cir. 1983) ("Although state law governs the substantive limitation period, federal law determines when a civil rights action accrues and, therefore, when the statute of limitations begins to run."). Thus, we have held that "the limitations period for [section] 1981 . . . employment discrimination cases commences when the plaintiff knows or reasonably should know that the [challenged] discriminatory act has occurred." McWilliams v. Escambia County Sch. Bd., 658 F.2d 326, 330 (5th Cir. 1981).

Determining the crucial issue of when the plaintiffs knew, or reasonably should have known that Alcoa was engaged in impermissible racial discrimination so as to give rise to a cause of action under section 1981, requires this court first to "identify precisely" the exact "unlawful employment practice of which [the plaintiffs] complain[ ]." See Delaware State College, 449 U.S. 250, 101 S. Ct. 498, 503, 66 L. Ed. 2d 431 (1980); Perez, 706 F.2d at 733. Two competing definitions of the relevant

discriminatory act, or unlawful employment practice, have been suggested by the parties: (1) the discriminatory denial of promotions and assignment of African-American workers to three specific areas of Alcoa's Rockdale Plant; and (2) the discriminatory exposure of African-American workers to asbestos dust. The plaintiffs advance the latter definition, maintaining that because Alcoa's discriminatory act was the exposure of its African-American employees to asbestos, they could not have been aware of Alcoa's discrimination until they began to experience the harmful physical effects of asbestos exposure, and that the statute of limitations was accordingly tolled.

We cannot, however, accept the plaintiffs' definition of the relevant discriminatory act, for the reason that the plaintiffs' definition, the latter and narrower of the two above-proposed definitions, is necessarily embraced by the former. Any discriminatory exposure of the plaintiffs to asbestos necessarily followed from any prior discriminatory assignment of African-American workers to the rod room, carbon plant, and potlining departments. There is little question that the greater physical harm to the plaintiffs arising from such discriminatory assignment was the resulting exposure to asbestos dust and to the risk of asbestos-related disease, nor is there any question that had the plaintiffs simply pursued a claim for personal injury, they could probably not be charged with knowledge of that actual exposure until they discovered its consequences upon falling ill. See, e.g., Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949) (holding that an employee exposed to a toxic substance is injured for purposes of the personal injury statute of limitations when the effects of the exposure manifest themselves). It remains, however, that the injury of asbestos exposure was occasioned only by a prior injury also cognizable under section

1981, namely, Alcoa's racially discriminatory assignment of its African-American workers to the three departments in question. The plaintiffs' claim, therefore, clearly implicates the rule of Delaware State College v. Ricks, 449 U.S. 250, 101 S. Ct. 498, 504, 66 L. Ed. 2d 431 (1980) (holding that the limitations period for employment discrimination claims begins to run from the date of the unfavorable employment decision). The proper focus of the limitations inquiry, therefore, must be on the time of that prior discriminatory act, and "not upon the time at which the consequences of [that act] became most painful." Delaware State College, 101 S. Ct. at 504. n8

Having identified the relevant discriminatory act, it remains for us to determine the point at which the plaintiffs can be charged with knowledge of that act. "An employee's claim accrues at the moment the employee believes (or has reason to believe) that he is the victim of discrimination." Ramirez v. City of San Antonio, 312 F.3d 178, 182 (5th Cir. 2002); see also Blumberg v. HCA Mgmt. Co., Inc., 848 F.2d 642, 645 (5th Cir. 1988) ("The [period of prescription] begins when facts that would support a cause of action are or should be apparent.").

Plaintiffs' amended complaint never alleges or even remotely suggests that plaintiffs were not during their Alcoa employment (and long before 1980) fully aware both of the discrimination being practiced against them and of its obvious effects (apart from asbestos). A statute of limitations may support dismissal under Rule 12(b)(6) where it is evident from the plaintiff's pleadings that the action is barred and the pleadings fail to raise some basis for tolling or the like. See Taylor, 296 F.3d at 378-79; see also Kansa Reinsurance v. Congressional Mortg. Corp., 20 F.3d 1362, 1366-70 (5th Cir. 1994) (dismissing, under Rule 12(b)(6), a claim as time barred

where the claim was clearly filed after the applicable statute of limitations had run and where it was evident from the pleadings that the plaintiff was not entitled to the benefit of the discovery rule); Cross v. Lucius, 713 F.2d 153, 156 (5th Cir. 1983); see also 5A CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (2d ed. 1990). Indeed it is apparent from the amended complaint that the plaintiffs then did have such awareness. n9 That is also consistent with the position taken by plaintiffs in the district court. n10

Plaintiffs could certainly have pursued a section 1981 claim decades earlier. Nor would Patterson have necessarily barred such a claim. It is the plaintiffs, after all, who characterize their assignment to the carbon plant and potlining department as conduct that occurred in the formation of their contracts. Because we conclude that the relevant unlawful employment practice must be defined as the plaintiffs' discriminatory assignment to, and denial of promotions from, the rod room, carbon plant, and potlining departments, and because the plaintiffs were admittedly aware of that practice long ago, we must also conclude that, under Delaware State College v. Ricks, the plaintiffs' section 1981 action against Alcoa is barred by the two-year statute of limitations.

We are not unmindful, however, of the possibility that the plaintiffs, though armed with the knowledge of Alcoa's racially discriminatory conduct, might have nevertheless concluded that they did not possess a viable claim under section 1981 against a private employer. That fact, however, cannot excuse delaying suit until the year 2000. There were indications as early as 1968, when the Supreme Court decided Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S. Ct. 2186, 20 L.

Ed. 2d 1189 (1968), recognizing a cause of action under section 1982 against private property owners, that section 1981 would supply a remedy against private employers for racial discrimination in contracting. Indeed, soon after Jones v. Alfred H. Mayer Co., a number of circuits began to apply section 1981 as a remedy for private discrimination. See Johnson v. Railway Express Agency, 421 U.S. 454, 95 S. Ct. 1716, 1720 n.6, 44 L. Ed. 2d 295 (1975) (listing five circuits that had recognized, beginning in 1971, that section 1981 affords a remedy against discrimination in private employment on the basis of race). And certainly since 1975, following the Court's decision in Johnson v. Railway Express Agency, the plaintiffs can be said to have known that a claim against their employer for racial discrimination might lie under section 1981. n11

We are also aware that statutes of limitations, by "compelling courts to determine that the defendant's right to be free of stale claims prevails over the plaintiff's desire to prosecute those claims," may sometimes bar otherwise meritorious actions, leaving certain conduct unpunished. See Albertson v. T.J. Stevenson & Co., 749 F.2d 223, 232 (5th Cir. 1984). Such limitations periods, however, reflect the valuable policy of requiring "the prompt vindication of known rights to ensure that the defendant is not prejudiced as a result of lost evidence, fading memories, and disappearing witnesses." Id. Moreover, holding a plaintiff responsible for a failure to take timely action to remedy known discrimination is consistent with our application of statutes of limitations in other areas. Thus in Alberston v. T.J. Stevenson & Co., we found, under the Jones Act, that even where a plaintiff later discovers that an act of the defendant caused a more serious injury than the plaintiff first realized, the statute of limitations nevertheless will be found to have commenced running

from the first point at which the plaintiff realized that he suffered harm, albeit minor, at the defendant's hands. Id. at 229 ("If some injury is discernable when the tortious act occurs, the time of event rule respecting statutes of limitations applies, and the plaintiff's cause of action is deemed to have accrued") (emphasis added).

Finally, we are unpersuaded by the plaintiffs' attempt to find refuge in the palliative language of a footnote of the Court's opinion in Delaware State College v. Ricks. In an attempt to avoid the sometime obdurate rule of Delaware State College v. Ricks, the plaintiffs point to the penultimate footnote of Justice Powell's opinion for the Court, in which he noted that "limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." Delaware State College, 101 S. Ct. at 506 n.16. We of course accept Justice Powell's caveat as a general proposition. What plaintiffs do not point out, however, is that in that same footnote, Justice Powell nevertheless held Ricks's claim to be barred since "there [could] be no claim . . . that Ricks was not abundantly forewarned" of the impending employment decision that ultimately formed the basis of his suit. Like Ricks, there is no allegation or indication that the plaintiffs here were not aware of the claimed racial discrimination decades before they brought suit. Nor do we see any danger that our application of the statute of limitations in this case risks undermining the protections of the civil rights statutes. The doctrines of equitable tolling and equitable estoppel remain available to those plaintiffs who, through no fault of their own, might otherwise be barred from bringing a claim by operation of a statute of limitations. See Ramirez v. City of San Antonio, 312 F.3d 178, 183 (5th Cir. 2002) ("We have found that equitable tolling may be appropriate when 'the plaintiff is actively misled by the defendant

about the cause of action or is prevented in some extraordinary way from asserting his rights.'"); Tyler v. Union Oil Co. of California, 304 F.3d 379, 391 (5th Cir. 2002) ("The doctrine of equitable estoppel 'may properly be invoked when the employee's untimeliness in filing his charge results from either the employer's deliberate design to delay the filing or actions that the employer should unmistakably have understood would result in the employee's delay.'"). n12 The plaintiffs were certainly aware, decades before they brought suit, that they had been the victims of racial discrimination and they have never alleged otherwise. We discern nothing in the record suggesting that they are entitled to any type of equitable tolling.

IV.

Because we find, under the rule of Delaware State College v. Ricks, that the plaintiffs' claim is barred by Texas's two-year statute of limitations, we AFFIRM the judgment of the district court dismissing the plaintiffs' action for failure to state a claim.

AFFIRMED.

FOOTNOTES

n1 The plaintiffs concede that any complained of discrimination had ended by 1970.

n2 Although the plaintiffs' theory of recovery in their original complaint was somewhat unclear, their amended complaints reflect that the plaintiffs pursued recovery for racial discrimination under 42 U.S.C. § 1981.

n3 The well-settled rule in this circuit that the 1991

amendments to § 1981 are not to be given retroactive effect forecloses the plaintiffs' argument, advanced in their second amended complaint and in their brief, that the pre-1991 version of § 1981 prohibited not only discrimination in formation of employment contracts, but also in the terms and conditions of employment contracts, and that the 1991 amendments, rather than overturning Patterson, merely clarified the original intent of § 1981. See Nat'l Ass'n of Gov't Employees, 40 F.3d at 713.

n4 See Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1067 (5th Cir. 1994) (accepting as true, for the purposes of a Rule 12(b)(6) dismissal, well-pleaded factual allegations, but rejecting "conclusory allegations or unwarranted deductions of fact."); Associated Builders v. Alabama Power Co., 505 F.2d 97, 100 (5th Cir. 1974) (same). See also, e.g., Guidry v. Bank of LaPlace, 954 F.2d 278, 281 (5th Cir. 1992); Taylor at 378.

n5 See 5A CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (2d ed. 1990) ("The court will not accept conclusory allegations concerning the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from his description of what happened, or if these allegations are contradicted by the description itself.").

n6 See Mississippi Power Co. v. NLRB, 284 F.3d 605, 619 n.39 (5th Cir. 2002) (noting that whether a contract is ambiguous and the interpretation of unambiguous contracts are questions of law); Lee v. Hunt, 631 F.2d 1171, 1180 (5th Cir. 1980) (same under Texas law).

n7 We note also that any claim of either discriminatory assignment or exposure is open to potentially serious

challenge on the merits. Summary judgment evidence submitted by Alcoa indicates that white, as well as African-American workers at the Rockdale plant were exposed to asbestos. In fact, Alcoa's summary judgment evidence indicates that of 600 white employees, 264 were also initially assigned to work in one of the three areas in question, the rod room, carbon plant, or potlining department; of 161 black employees, 80 were initially assigned to one of the same three areas. Alcoa's evidence does not, of course, establish the respective tenure, in these departments, of white and black employees who were initially assigned to the areas in question. It might well not, therefore, suffice to rebut completely any charge of discriminatory exposure that might be cognizable under the amended § 1981. Alcoa's unrebutted evidence does, however, at the least reveal potential serious problems with any claim that African-American employees were initially assigned in disproportionate numbers, as part of the formation of their contracts, to the rod room, carbon plant, and potlining departments.

n8 We further observe that the focus on the racially discriminatory act is appropriate because this is a suit for racial discrimination under § 1981, not an ordinary personal injury suit. We further note in this connection that plaintiffs dropped their gross negligence claim after Alcoa's first motion to dismiss which asserted that such claim would be barred by the exclusive remedy provisions of the Texas Workers' Compensation Act, it being undisputed that plaintiffs were Alcoa employees complaining of injuries sustained in the course and scope of their employment, and that Alcoa was a subscriber under the Texas Workers Compensation Act. Hence had this been a personal injury suit it would be precluded by the exclusive remedy provision of the Texas Workers Compensation Act. Tex. Lab. Code §

408.001. See, e.g., Hoffman v. Trinity Industries, 979 S.W.2d 88, 89 (Tex. App. Beaumont 1998, pet. dism'd by agr.).

Those similarly situated to plaintiffs would not, however, be without a remedy, for Workers Compensation benefits would be available provided they filed a claim within one year from when they knew or should have known that the occupational disease was related to their employment. See Tex. Lab. Code § 409.003:"An employee or a person acting on the employee's behalf shall file with the commission a claim for compensation for an injury not later than one year after the date on which:(1) the injury occurred; or

(2) if the injury is an occupational disease, the employee knew or should have known that the disease was related to the employee's employment."

n9 See, e.g., the following portions of the amended complaint:"9. The named Plaintiffs are of the African-American, or Negro race and were employed and worked primarily in only three departments: the pot lining department, the carbon plant, and the rod room at Alcoa's facility in Rockdale, Texas.

10. All of the employees in these departments from the 1950s, when the plant opened, until the early 1970s were of the Negro race except the supervisors or the second classmen, i.e. crane operators, etc.

11. As Negro employees, they were not allowed to use restroom and dining facilities utilized by the white employees, nor were they allowed advancement to other higher paying jobs in the other departments, rather, they were required to continue to work in the pot lining, the carbon plant and the rod room departments. Alcoa

utilized this employment practice in its other similar facilities throughout the southern portion of the United States.

16. Throughout this period of time, with the exception noted above, Alcoa employed only employees of the Negro race in these departments."

n10 In an affidavit attached to the plaintiffs' response to Alcoa's motion for summary judgment, a former employee at the Rockdale plant stated that" the Negro employees, were required to use separate restroom facilities as well as lunch room facilities. This separate use of facilities did not change until the early 1970s. Also black employees, even though qualified and with seniority, were not allowed to advance to supervisory or 'white' jobs in these departments, nor were we allowed to advance to certain jobs above the 'red line' which was a color line nor to jobs out of these departments. "Similarly, the testimony of Jones and Parks on deposition reflects that there were positions at the plant that African-Americans were not permitted to hold and that if they applied for could expect to be fired, that any promotions for African-Americans in the potlining and carbon areas were understood to be temporary until the position could be filled by a white, that African-American employees could not eat in the plant cafeteria and that the plant had separate restrooms and showers for black and white employees. Some of this testimony was cited in one of plaintiffs' briefs below.

n11 We note also that there were indications, as early as 1982, that a cause of action could lie in this circuit under § 1981 for discrimination in the assignment of employees to different tasks in the workplace. See Williams v. New Orleans Steamship Ass'n, 673 F.2d 742, 746, 752-55 (5th Cir. 1982) (examining a claim of

discriminatory assignment of longshoremen to deck and wharf jobs brought under Title VII and section 1981).

n12 Finally, we would observe that our decision would not leave similarly situated plaintiffs without a remedy for asbestos-related diseases incurred in the workplace. Workers compensation benefits would remain available. See last paragraph of note 8 supra.

CIVIL ACTION NO. W-00-CA-300

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
WACO DIVISION

ISAIAH RUSSELL JONES, ROBERT SPARK, JR.
and HERMAN PARKS, JR.
Plaintiffs,

v.

ALCOA, INC.,
Defendant.

December 26, 2001

MEMORANDUM OPINION AND ORDER

This case is a personal injury case cloaked in the trappings of a discrimination case. Plaintiffs allege personal injuries that occurred from employment discrimination in violation ofthe Civil Rights Act of 1866, 42 U.S.C. § 1981. To call this case a mutant mixture of personal injury and employment discrimination cases would be an understatement. Plaintiffs essentially contend that they have suffered personal injuries because of exposure to asbestos, and that their exposure to asbestos was because of insidious racial segregation by the Defendant.

Plaintiffs assert that they are former employees of the Defendant, Alcoa, Inc., and that they were initially assigned to work exclusively in three departments at the Defendant's Rockdale, Texas facility-the pot lining department, the carbon plant, and the rod room. Plaintiff's contend that they were required to work in

these areas of the facility because of their race. All of the Plaintiffs are African-American. Plaintiffs further contend that theywere subjected to a substantial risk o& exposure to asbestos, and to respiratory diseases common to continued exposure to asbestos particles and fibers. Plaintiffs contend that the segregation of African-American employees into asbestos-filled areas occurred from a period of time beginning in the early 1950's when the Rockdale facility was opened and continuing until the 1970's.

The Defendant filed a motion to dismiss for failure to state a claim upon which relief may be granted based principally upon that argument that the Plaintiffs' claim is time-barred. The Court initially denied the Defendant's motion to dismiss by finding that "It is not apparent on the face of the Plaintiffs' second amended complaint that the Plaintiffs' awareness oftheir injuries occurred more than two years prior to the filing of their lawsuit." Following oral argument on the Plaintiff's motion for class certification, however, the Court now reconsiders the order denying Defendant's motion to dismiss.

DISCUSSION

In employment discrimination actions, the proper focus is on the discriminatory act and not the consequences of the act. Thus, the starting point for detennining when an employment discrimination claim accrues is the alleged unlawful, discriminatory conduct. The Court must first ask what alleged unlawful conduct forms the basis for the claim and when this act occurred. Delaware State College v. Ricks, 449 U.S. 250, 257 (1980) (determining the timeliness of plaintiffs employment discrimination claim under 42 U.S.C. § 1981 "requires us to identify precisely the 'unlawful employment practice' of which

he complains."). In Ricks, the Supreme Court held that the statute of limitations for Section 1981 claims accrued at the time of the employment decision, not when the consequences of that decision came into effect. Ricks, therefore, stands for the proposition that a Section 1981 claims accrues on the date in which the allegedly discriminatory employment decision was made and communicated, not on the date in which the results of the alleged discrimination were discovered. Ricks, 449 U.S. at 258; see also Bailey v. Northern Indiana Pub. Service Co., 910 F.2d 406, 412 (7th Cir. 1990) (holding that a cause of action under section 1981 accrues when the plaintiff receives notice that the defendant has discriminated against him). Simply put, if the discrimination alleged is a single act, the statute begins to run at the time of the act. Ricks, 449 U.S. at 258.

The discriminatory act at issue in this case is the alleged racial segregation of initial job placements in the Rockdale facility, On the face of the Plaintiffs' complaint, this racial segregation occurred during an 18-year period beginning in 1952, when the Rockdale facility opened, and ending in roughly 1970. The results of this alleged discriminatory conduct were only recently discovered by the Plaintiffs. The Court's prior decision on the limitations issue actually treated this case as a pure personal injury case and applied the discovery rule to the Plaintiff's' injuries. Under Hicks, however, the Plaintiffs were injured when they were initially segregated because of their race into the hazardous areas of the Rockdale facility, not when they discovered that they were suffering from diseases associated withashestos exposure. Thus, taking all of Plaintiffs' allegations as true, their section 1981 cause of action accrued the moment the Defendant segregated them into the hazardous areas of the plant based on their race. As all of the Plaintiffs were hired and initially

placed in the hazardous areas of the facility more than two years ago, Plaintiffs' claims are time-barred.

Accordingly, it is

ORDERED that Defendant's Motion to Dismiss is GRANTED.

It is further ORDERED that this case is DISMISSED AS TIME-BARRED.

It is further ORDERED that any pending motions are DENIED AS MOOT.

SIGNED this 26th day of December, 2001.

WALTER SMITH, JR.
UNITED STATES DISTRICT JUDGE

No. 02-50097

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ISAIAH RUSSELL JONES; ROBERT SPARKS, JR; HERMAN PARKS, JR
Plaintiffs-Appellants

v.

ALCOA, INC
Defendant-Appellee

August 18, 2003, Filed

Appeal from the United States District Court for the Western District of Texas, Waco

ON PETITION FOR REHEARING

Before GARWOOD, JONES and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition far rehearing is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

Supreme Court, U.S.
FILED
DEC 2 3 2003
OFFICE OF THE CLERK

No. 03-780

IN THE

Supreme Court of the United States

ISAIAH RUSSELL JONES, ROBERT SPARKS, JR., & HERMAN PARKS, JR.,

Petitioners,

v.

ALCOA INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit properly affirmed the district court's decision to dismiss the Petitioners' Complaint based upon the applicable two year statute of limitations where Petitioners' claims under 42 U.S.C. § 1981 for alleged discriminatory acts occurred over thirty to fifty years ago?

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING

The names of the parties to this proceeding appear on the cover. There is no parent or publicly held company that owns 10% or more of Respondent Alcoa Inc.'s stock.

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COUNTER STATEMENT OF THE CASE

Petitioners are former employees who worked for Alcoa in the Rod Room, Carbon Plant, and Potlining Departments at Alcoa's Rockdale plant in Milam County, Texas. R4:91 (Complaint, ¶¶ 7, 9)[1] Petitioners allege that Alcoa initially assigned them and then limited them to working in these departments in an effort to expose African-American workers, rather than white workers, to the health risks of asbestos exposure, and thus, engaged in racially discriminatory practices. R4:91-92 (Complaint at ¶¶ 7, 9, 17, 19).[2] Petitioners further allege that Alcoa engaged in other racially discriminatory acts, including denying them access to dining and restroom facilities, denying them transfers out of the above-mentioned departments and denying them promotions to higher paying positions. R4:92 (Complaint at ¶ 11). These practices allegedly occurred during the 1950's until the early 1970's. R4:91 (Complaint at ¶ 10).

---

1. This cite form refers to Alcoa's record excerpts prepared for the Fifth Circuit, tab 4, page 91. The page number refers to the district court's pagination in the lower right-hand corner of the record excerpts.

2. While not relevant to the narrow issue presented for review, Alcoa notes, as did the Fifth Circuit, that Petitioners' allegations of racial discrimination are not supported by the record. *See* Fifth Circuit Opinion, Appendix at pp. 13a & 14a n.7. Instead, the record establishes that approximately two-thirds of the employees in the Potlining Department were white and Petitioners themselves testified that they worked side by side with white workers in each of the three departments where they claim they were exposed to the asbestos. R4:91-92; R6:194-195. Moreover, the record establishes that a number of African-American workers were not initially assigned to the three departments as Petitioners allege. R7:316.

Petitioners assert that they developed lung disorders of varying degrees from their alleged exposure to asbestos. R4:92-93 (Complaint at ¶¶ 19-21). However, Petitioners did not file this suit as a personal injury suit or other tort cause of action against Alcoa.[3] Instead, Petitioners filed suit against Alcoa alleging intentional race discrimination in violation of 42 U.S.C. § 1981 ("Section 1981"), and sought personal injury damages for their alleged lung disorders. The district court dismissed Petitioners' claims as time barred under the applicable two year statute of limitations. District Court Opinion, Appendix at p. 18a. The Fifth Circuit affirmed this decision in a written opinion and further denied Petitioners' Motion for Rehearing. Fifth Circuit Opinion, Appendix at pp. 1a and 22a. The Petitioners have now sought certiorari review with this Court. For the reasons set forth below, their petition should be denied.

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3. The record shows that Plaintiffs dropped their gross negligence claim in their amended complaint after Alcoa's first motion to dismiss asserted that Plaintiffs' gross negligence claim would be barred by the Texas Workers' Compensation Act, which provides the exclusive remedy for employees who are injured in the course and scope of their employment. *See* R1:14; R2:49-52. At all relevant time periods, Alcoa was a subscriber under the Texas Workers' Compensation Act. R1:17. Accordingly, if Petitioners had brought this case as a personal injury suit, Petitioners' claims of injuries that were allegedly sustained while in the course and scope of employment would have been barred by Tex. Lab. Code. Ann. § 408.001 (Vernon 1996) (the "exclusive remedies" provision). *See, e.g., Hoffman v. Trinity Indus., Inc.*, 979 S.W.2d 88, 89 (Tex. App.-Beaumont 1998, pet. dism'd by agr.) ("The Texas Workers' Compensation Act is the exclusive remedy for an employee injured in the course and scope of his employment.") Petitioners would not have been left without a remedy, however, as they could have sought recovery under the workers' compensation laws.

REASONS FOR DENYING THE PETITION

I. The Petition Does Not Present Any Issue Appropriate For Review Under Supreme Court Rule 10 And The Writ Should Therefore Be Denied.

Supreme Court Rule 10 makes clear that review by writ of certiorari is not a matter of right but of sound judicial discretion. A petition for a writ of certiorari should be granted only in cases where there are special and important reasons for Supreme Court review. This Court has held that "'special and important reasons' imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Further, this Court has stated that certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Id.* at 79 (citations omitted). This case fails to present special or important reasons for Supreme Court review. To the contrary, in bringing this petition for certiorari, Petitioners raise nothing new to suggest that the decisions of the Fifth Circuit or the district court were in error. Instead, Petitioners continue to make the same specious arguments which have been rejected by both lower courts in this case under well-established and uncontested law.

Moreover, Petitioners do not allege, nor is there any evidence to suggest, that any of the considerations of Rule 10 apply. There is no conflict in the Circuits on the narrow issue raised by Petitioners. Instead, the applicable law

established by this Court in *Delaware State College v. Ricks*, 449 U.S. 250, 259 (1980), has been consistently applied by each of the Circuits.[4] Likewise, the petition does not present any conflict on an important federal question. Finally, this case does not present any compelling circumstances which indicate that the Court of Appeals or the district court departed from the accepted and usual course of judicial proceedings so as to warrant review by this Court. For all of these reasons, as well as those set forth below, the petition for certiorari review should be denied.

---

4. *See Campbell v. Bank Boston, N.A.*, 327 F.3d 1, 11 (1st Cir. 2003); *Flaherty v. Metromail Corp.*, 235 F.3d 133, 137 (2d Cir. 2001); *Watson v. Eastman Kodak*, 235 F.3d 851, 855 (3d Cir. 2000); *Martin v. Southwestern Virginia Gas Co.*, 135 F.3d 307, 310 (4th Cir. 1998); *Jones v. Alcoa Inc.*, 339 F.3d 359, 365-68 (5th Cir. 2003); *Amini v. Oberlin College*, 259 F.3d 493, 498-99 (6th Cir. 2001); *Williamson v. Ind. Univ.*, 345 F.3d 459, 463 (7th Cir. 2003); *Conner v. Beckitt & Colman*, 84 F.3d 1100, 1102 (8th Cir. 1996); *R.K. Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1059-60 (9th Cir. 2002); *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1187 (10th Cir. 2003); *Everett v. Cobb County Sch. Dist.*, 138 F.3d 1407, 1410 (11th Cir. 1998); *Crandall v. Paralyzed Veterans of Am.*, 146 F.3d 894, 896 (D.C. Cir. 1998) (all holding that the statute of limitations runs from the date on which a plaintiff knows or reasonably should know that a discriminatory act has occurred, not the date on which a plaintiff knows the consequences or effects of the alleged discriminatory act).

II. Certiorari Review Is Not Appropriate In This Case Where The United States Court Of Appeals For The Fifth Circuit Properly Applied The Applicable Two Year Statute Of Limitations To Bar Petitioners' Claims Under Section 1981.

In bringing this petition for certiorari review, Petitioners do not include any new "facts" or "evidence" to suggest that the decisions of the lower courts were incorrect. Instead, Petitioners would like this Court to apply uncontested law to undisputed facts and reach a different result.[5] This is not a basis for Supreme Court review and this Court should deny the petition for certiorari.

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5. This strategy is most evident in the final section of the petition in which Petitioners admit that

> permitting a lawsuit over conduct that occurred between thirty and fifty years ago runs against the grain of most courts. There is an intuitive reaction to such a suit that says that Plaintiffs waited too long, that proof would be difficult if not impossible, or that the defense of the case would be hampered by the lapse of time.

(Petition at p. 23). Petitioners present nothing to suggest that the applicable precedent should be disregarded to allow such a suit to go forward in this case.

A. The Statute Of Limitations In A Section 1981 Case Runs From The Date Of The Alleged Discriminatory Acts, Not The Date On Which The Full Consequences Of Those Acts Are Known.

This case involves the well-established law concerning when a cause of action accrues in a Section 1981 discrimination case.[6] This Court's long-standing precedent, which has been interpreted and applied consistently by the Fifth Circuit, governs the resolution of this case. In *Delaware State College v. Ricks*, 449 U.S. 250, 259 (1980), this Court stated that in a Section 1981 action, the "time limitations periods commence with the date of the 'alleged unlawful employment practice.'" *See also Chardon v. Fernandez*, 454 U.S. 6, 7-8 (1981) (holding that the limitations period for discriminatory discharge cases begins running at the time of notification, rather than at the time of discharge). Thus, in an employment discrimination case, a court looks to the time of the alleged discriminatory act – not to the time when a victim discovers a particular injury – to determine when the statute begins to run. As this Court further explained in *Ricks:* "[T]he proper focus is on the time of the *discriminatory acts*, not upon the time at which the c*onsequences* of the acts became most painful." *Id.* at 258 (*quoting Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979)) (emphasis added).

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6. The parties do not dispute that this Section 1981 case is governed by the two-year statute of limitations for personal injury actions in Texas. *See Johnson v. Railway Express Agency, Inc.*, 95 S. Ct. 1716, 1721 (1975) (federal civil rights actions brought under section 1981 are governed by most closely analogous limitations period provided under state law); *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 424 (5th Cir. 2000) (under Texas law Section 1981 claims are subject to a two-year statute of limitations).

In this case, the alleged "acts of discrimination" which form the basis for Petitioners' Section 1981 claims are clearly set forth in the Complaint.[7] First, Petitioners allege that they were discriminated against as the result of alleged racially-based placement into one of the three departments where asbestos was purportedly present. R4:91-93 (Complaint at ¶¶ 7, 9, 17, 19). Second, the Complaint alleges that Petitioners were denied access to dining and restroom facilities. R4:92 (Complaint at ¶ 11). Third, the Complaint alleges that Petitioners were denied transfers out of the above-mentioned departments. *Id.* Finally, the Petitioners allege that they were denied promotions to higher paying positions. *Id.* The Complaint further sets forth the date of these alleged discriminatory acts as the 1950's to 1970's. R4:91 (Complaint at ¶ 10).

The two-year statute of limitations begins to run from the date of the alleged acts of discrimination. Petitioners do not dispute that these alleged discriminatory acts occurred thirty to fifty years ago, or that Petitioners were aware of the alleged discriminatory practices at that time. The Fifth Circuit properly agreed that the precedent in *Ricks* was applicable to this matter. *See* Fifth Circuit Opinion, Appendix at p. 8a.

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7. The Fifth Circuit further noted that there was a serious question as to whether the claims as pled were even cognizable under Section 1981 because the Complaint "is devoid of any detail, let alone any factual basis to support the conclusion that assignment to the three departments in question was, in fact, a term implied in the plaintiffs' initial employment contract. . . ." Fifth Circuit Opinion, Appendix at p. 4a. *See also Felton v. Polles*, 315 F.3d 470, 484-85 (5th Cir. 2002) (claim of racial harassment based on conduct occurring prior to the 1991 amendments is not actionable under section 1981); *National Ass'n of Gov't Employees v. City Pub. Serv. Bd. of San Antonio, Tex.*, 40 F.3d 698, 713 (5th Cir. 1994) (1991 amendments to section 1981 are not given retroactive effect).

("The plaintiffs' claim, therefore, clearly implicates the rule of *Delaware State College v. Ricks*, 101 S. Ct. 498, 504 (1980) (holding that the limitations period for employment discrimination begins to run from the date of the unfavorable employment decision)").

Petitioners attempt to avoid the application of *Ricks* by misstating the record. The Petition is replete with inaccurate representations that Petitioners "did not suffer the typical injury from a discriminatory act" and "are not complaining that the discrimination denied them some contractual benefit like fair wages, proper promotions or other employment benefits." Petition at 10, 18.[8] However, their Complaint alleges just the opposite. More specifically, the Complaint states as follows:

> As Negro employees, they were not allowed to use restroom and dining facilities utilized by the white employees, nor were they allowed advancement to other higher paying jobs in the other departments; rather, they were required to continue to work in the pot lining, the carbon plant and the rod room departments. Alcoa utilized this employment practice in its other similar facilities throughout the southern portion of the United States.

Petition at 4; R4:92 (Complaint, ¶ 11). Thus, it is clear from the face of the Complaint that Petitioners allege that they suffered an injury as a result of the alleged discrimination

8. Petitioners acknowledge that if they were arguing for these things "then Alcoa's rule [concerning the statute of limitations] might make sense." Petition at 18. Given the facts as alleged in the Complaint, Alcoa's "rule" makes eminent sense.

within the limitations period. The alleged injuries coming from asbestos exposure are merely an additional "consequence" of the alleged discrimination – they are not the *acts of discrimination* themselves. This case therefore clearly falls within the framework of the *Ricks* opinion. If Petitioners are held to their pleadings, the dates of the alleged discriminatory acts occurred more than thirty years ago. These are the determinative dates for the limitations period according to *Ricks*. Accordingly, the Fifth Circuit and district court correctly dismissed Petitioners' claims in their entirety as time barred.

B. The Discovery Date Of Petitioners' Personal Injuries Is Irrelevant Because This Is Not a Personal Injury Cause Of Action.

Petitioners implicitly recognize that the rule set forth in *Ricks* governs the outcome of this case. In an effort to avoid that result, Petitioners argue that the "discovery rule" applicable to personal injury lawsuits should apply.[9] As Petitioners elected to bring this matter as an employment discrimination case, the rules regarding the time limitations periods for employment discrimination cases are dispositive,

9. Petitioners' confusion regarding the crux of their case permeates their entire petition. Petitioners argue that they "were not aware of the existence of an injury because the injury (respiratory disease) did not manifest itself for many years after the date of the injury (exposure to asbestos due to segregated conditions at the Rockdale plant)." Petition at 16-17. In one sentence, Petitioners define "the *injury*" (emphasis added) to be two different things: the respiratory disease and the alleged discriminatory employment acts. *Id.* Petitioners cannot have it both ways: they have pled a discrimination cause of action and must be held to their pleadings regarding their claim – the alleged discriminatory act of segregated initial job assignments.

not the rules regarding limitations in personal injury actions. Accordingly, the district court and the Fifth Circuit both properly recognized that *Ricks* is the controlling authority for this case.

Petitioners present nothing new to this Court to suggest that the application of *Ricks* to the facts of this case was in error. Instead, Petitioners make the same specious argument rejected by the Fifth Circuit that *Ricks* provides an exception in this case. In *Ricks*, this Court stated in dicta that the limitations period "should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." *Ricks*, 101 S. Ct. at 506 n.16.[10] However, the Fifth Circuit properly found that Petitioners' interpretation of *Ricks* did not merit a different result in this case:

> Finally, we are unpersuaded by the plaintiffs' attempt to find refuge in the palliative language of a footnote of the Court's opinion in Delaware State College v. Ricks . . . What plaintiffs do not point out, however, is that in the same footnote, Justice Powell nevertheless held Ricks' claim to be barred since "there [could] be no claim . . . that Ricks was not abundantly forewarned" of the impending employment decision that ultimately formed the basis of his suit. Like Ricks, there is no allegation

10. In making this reference, the *Ricks* court cited to two cases which are vastly different from the case at bar. In both *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761 (1979) and *Love v. Pullman Co.*, 404 U.S. 522, 526-27 (1972), this Court was concerned with barring a plaintiff where the procedural technicalities of filing with a state agency or the EEOC caused the claim to be untimely. This is not the case here. Petitioners were well aware of the alleged acts of discrimination which form the basis for their Section 1981 action and never brought a suit until decades after the triggering event occurred.

> or indication that the plaintiffs here were not aware of the claimed racial discrimination decades before they brought suit. Nor do we see any danger that our application of the statute of limitations in this case risks undermining the protections of the civil rights statutes.

Fifth Circuit Opinion, Appendix at p. 11a.

Petitioners have set forth no argument as to why the well-reasoned decision of the Fifth Circuit is incorrect. Tellingly, Petitioners do not cite a single Section 1981 or employment discrimination case in which the discovery rule has been applied. To the contrary, courts universally hold that with respect to employment discrimination cases, the limitations period begins to run at the moment the plaintiff is on notice of the *discriminatory act*. Petitioners here have never disputed that they were on notice of the alleged discriminatory assignments upon their occurrence. Accordingly, the fact that they did not suffer the full extent of injuries from the alleged discriminatory acts is of no import. Instead, the voluminous citations in the petition are all from cases outside the employment discrimination context.[11] Indeed, the case relied on most heavily by

11. None of the Petitioners' citations in the discovery portion of their petition support their argument that the discovery rule should be applied in a Section 1981 case. The following cases were cited in that portion of the petition. *United States v. Kubrick*, 444 U.S. 111, 122 (1979) (holding that the plaintiff's Federal Tort Claims Act for medical malpractice was barred by the statute of limitations and that the discovery rule did not operate to defer the running of the limitations period); *Computer Assoc.'s Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1996) (holding that the discovery rule did not

(Cont'd)

Petitioners, *Urie v. Thompson*, 337 U.S. 163 (1949), cites to language from a state workmen's compensation decision in finding that the discovery rule applies in the context of a personal injury action under the Federal Employers' Liability Act ("FELA"). The instant case was brought as an employment discrimination action, not a personal injury case. The discovery rule is simply inapplicable in a case, such as this, where the petitioners were aware of the event that triggered the running of the statute: the alleged acts of discrimination. Petitioners' lack of knowledge as to the consequences of those alleged acts is simply irrelevant in the context of this suit as pled by Petitioners.

Throughout this case, Petitioners have sought to pursue a personal injury claim utilizing an employment discrimination cause of action. Attempting to pick and choose

(Cont'd)

apply to the plaintiff's misappropriation of trade secrets claim); *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732 (Tex. 2001) (holding claimed injury was not "inherently undiscoverable"); *S.V. v. R.V.*, 933 S.W.2d 1, 7 (Tex. 1996) (holding that plaintiff's negligence claim for sexual abuse by her father was barred by limitations because her injury was not "objectively verifiable"); *Apex Towing Co. v. Tolin*, 41 S.W.3d 118 (Tex. 2001) (tolling plaintiff's legal malpractice claims until the underlying litigation was finally resolved); *HECI Exploration Co. v. Neel*, 982 S.W.2d 881 (Tex. 1998) (holding that the discovery rule did not toll the statute of limitations for breach of contract and negligent misrepresentation claims); *DuBose v. Kansas City Southern Railway*, 729 F.2d 1026, 1028 (5th Cir. 1984) (applying the *Kubrick* discovery rule to a wrongful death action brought under the Federal Employers' Liability Act (FELA)); and *Albertson v. T.J. Stevenson & Co., Inc.*, 749 F.2d 223 (5th Cir. 1984) (holding that the statute of limitations barred the plaintiff's personal injury claims under the Jones Act) (Petitioners' papers incorrectly cited this holding for the proposition that the statute of limitations did not bar the claims).

the most favorable provisions from each body of law, Petitioners crafted their case to avoid the worker's compensation bar, but have run up against the irrefutably applicable statute of limitations. As a result, Petitioners have now switched their focus away from the act of discrimination, which Section 1981 was enacted to remedy, and have focused instead on the alleged consequences of that purported discrimination. The discovery of additional consequences of alleged discrimination is of no relevance in a Section 1981 case. Instead, the statute of limitations clearly begins to run at the time Petitioners were first aware of the alleged discriminatory acts. Here, those acts are the placement of Petitioners in a particular department allegedly because of their race. Because those acts occurred nearly a half century ago, Petitioners' claims are time barred.

C. The Fifth Circuit And District Court Properly Barred Petitioners' Claim Because The Limitations Period Was Designed To Protect Defendants From Defending Stale Claims Such As This One.

This Court has recognized that limitations periods were designed to protect potential defendants from cases such as this one:

> Statutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the "right to be free of stale claims in time comes to prevail over the right to prosecute them." These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from

> having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise.

United States v. Kubrick, 444 U.S. 111, 117 (1979) (internal citations omitted). The Fifth Circuit and the district court properly applied the statute of limitations in this case to prevent Petitioners' claims from going forward. In this case, Alcoa's right to be free from such a stale claim should prevail over Petitioners' desire to prosecute it, especially where Petitioners would not have been left without a remedy. *See supra* note 3.[12]

In a Section 1981 discrimination case, Plaintiffs are required to show discriminatory intent by the employer to successfully prosecute their claim. *General Bldg. Contractors Assoc., Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1981). Showing a discriminatory intent, not to mention defending against allegations half a century old, would be nearly impossible as witnesses certainly have died, memories have faded, and documents, if they still exist, may be impossible to locate. It would be fundamentally unfair to allow Petitioners to proceed with an employment discrimination suit on these facts. The Fifth Circuit properly upheld Alcoa's statute of limitation defense and Petitioners' writ should be denied.

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12. Moreover, as noted by the Fifth Circuit, the record is devoid of any evidence that would suggest Petitioners are entitled to any sort of equitable tolling of the applicable statute. Fifth Circuit Opinion, Appendix at p. 12a.

CONCLUSION

Because the Court of Appeals properly affirmed the District Court's decision dismissing Petitioners' Complaint based upon the applicable statute of limitations and Petitioners present no issue worthy of this Court's certiorari review, Respondent Alcoa respectfully requests that the Petition for Certiorari review be denied in all respects.

Respectfully submitted,

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